No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) 3

Arizona v. *United States*, 132 S. Ct. 2492 (2012) 2, 9

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 10

Lincoln v. *Vigil*, 508 U.S. 182 (1993) 10

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 3

Mendoza v. *Perez*, 754 F.3d 1002 (D.C. Cir. 2014) 6

Mountain States Legal Found. v. *Glickman*, 92 F.3d 1228 (D.C. Cir. 1996) 6

National Park Hospitality Ass'n v. *Department of the Interior*, 538 U.S. 803 (2003) 10

Pennsylvania v. *New Jersey*, 426 U.S. 660 (1976) 4, 5

Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) 10

Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 7, 8, 9

Constitution, statutes and regulations:

U.S. Const. Art. III 2, 3, 6

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 3

5 U.S.C. 553(b)(A) 10

5 U.S.C. 701(a)(2) 6

5 U.S.C. 702 6

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 5

8 U.S.C. 1103(a) 9, 10

8 U.S.C. 1151(b)(2)(A)(i) 9

Statutes and regulations—Continued: Page

8 U.S.C. 1154(a)(1)(A)(i) 9
8 U.S.C. 1182(a)(9)(B)(i) 9
8 U.S.C. 1182(a)(9)(B)(ii) 9
8 U.S.C. 1182(a)(9)(B)(v) 9
8 U.S.C. 1255(a) 9
8 U.S.C. 1255(c)(2) 9
8 U.S.C. 1324a 10
8 U.S.C. 1324a(a) 10
8 U.S.C. 1324a(h)(3) (1994) 7
8 U.S.C. 1324a(h)(3) 9, 10
8 U.S.C. 1325 7
8 U.S.C. 1427(a) 10
8 U.S.C. 1611(b)(2) (Supp. V 1999) 7
8 U.S.C. 1621 5
8 U.S.C. 1621(c) 5
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 4
§ 202(c)(2)(B)(viii), 119 Stat. 313 4
Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Tit. V, § 1503(d)(2)(D)(i)(II) and (IV), 114 Stat. 1522 8
6 U.S.C. 202(5) 9
28 U.S.C. 2401(a) 10
Tex. Transp. Code Ann. (West Supp. 2015):
§ 521.142(a) 4
§ 521.421(a-3) 5
8 C.F.R.:
Section 103.12(a)(3)(i) (1999) 8
Section 274a.12(a)(11) 8
Section 274a.12(c)(1)-(7) 8

Regulations—Continued: Page

Section 274a.12(c)(9)-(12) 8
Section 274a.12(c)(14) (1999) 8
Section 274a.12(c)(16)-(17) 8
Section 274a.12(c)(21) 8

Miscellaneous:

Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 10
17 Fed. Reg. 11,489 (Dec. 19, 1952) 10
46 Fed. Reg. 25,081 (May 5, 1981) 10
51 Fed. Reg. 39,385-39,386 (Oct. 28, 1986) 10
52 Fed. Reg. 46,093 (Dec. 4, 1987) 10, 11
6 Charles Gordon et al., *Immigration Law and Procedure* (1998) 8
Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* (July 2013), http://txdps.state.tx.us/DriverLicense/documents/verifyingLawfulPresence.pdf 5
13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2008) 6

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REPLY BRIEF FOR THE PETITIONERS

1. Respondents' brief in opposition ultimately underscores the need for immediate review by this Court. Indeed, respondents assert that the Guidance is a "crucial" step in federal immigration policy, with "significant and immediate" consequences. Opp. 3, 38; see Pet. 35. As part of a broader effort to focus limited resources on securing the border and removing serious criminals, the Guidance embodies an exercise of the Secretary of Homeland Security's longstanding authority to accord deferred action as a matter of enforcement discretion—here, to non-priority parents of U.S. citizens or lawful permanent residents. It encourages "hard-working people who have become integrated members of American society" to identify themselves and would provide a measure of dignity by temporarily allowing them to stay and work on the books, rather than off the books at below-market wages. Pet. App. 415a. The validity of a nationwide injunction that blocks a "crucial" policy potentially

affecting millions of families—and that implicates fundamental questions of standing, separation of powers, federal immigration authority, and administrative law—should be decided by this Court, not a divided court of appeals.

Respondents halfheartedly contend that "certiorari is not warranted at this stage." Opp. 38 (capitalization omitted). But this Court decided *Arizona* v. *United States*, 132 S. Ct. 2492 (2012), on review of a preliminary injunction, *id.* at 2498, and the justifications for doing so here are stronger. The court of appeals' key legal rulings are definitive, not tentative. See Pet. 34 (collecting quotations). And respondents identify nothing that might occur on remand to justify delay. Postponing review would indefinitely prolong the disruption of federal immigration policy and would continue to deprive millions of parents of U.S. citizens and permanent residents of the opportunity for deferred action and work authorization.

2. Respondents' principal argument is that review is unwarranted because the decision below is correct. But this Court should decide that question on plenary review. In any event, respondents are wrong.

Standing. Respondents embrace the court of appeals' radical expansion of Article III standing, which lacks any principled limitation. Respondents do not dispute, for example, that under the court's "pressure" theory, Texas would have standing to challenge federal policies for parole or asylum based on the State's independent voluntary choice to subsidize driver's licenses for parolees or asylees. See Pet. 17-18. And the court's theory cannot be limited to immigration. Respondents do not dispute, for instance, that any State that borrowed the federal definition of

"adjusted gross income" would thereby have standing to challenge an Internal Revenue Service ruling affecting its computation. Pet. 18.

Remarkably, respondents' vision of Article III is broader still, as they advance alternative theories that even the district court rejected. Respondents contend (Opp. 17) that they have standing because the Guidance allegedly "will cause them to incur healthcare, law-enforcement, and education costs." But as the district court explained, any such costs are not fairly traceable to the Guidance, as it covers only aliens who have already lived here for years. Pet. App. 309a-310a. Respondents' *parens patriae* claim is similarly baseless, as "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Respondents urge this Court to ignore the breadth of the court of appeals' holding, contending that it is "speculation that a state would sue" in the myriad circumstances the holding would permit. Opp. 19 (citation omitted). But that blithe assertion concedes that Article III—a critical separation-of-powers protection—would be no barrier. Respondents contend (*ibid.*) that the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, would impose limits, but in their view the zone-of-interests test is essentially meaningless and other APA limitations are readily overcome. See pp. 5-8, *infra*. Respondents also contend (Opp. 19) that *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), already "entail[s] similar risks." But in respondents' view (Opp. 10), "any ordinary litigant"—not merely States—would have standing here. Regardless, respondents' claim is far broader than in

Massachusetts: The State itself has created the only connection between the challenged federal action and the alleged harm, and respondents rely not on a particular cause of action in a specific substantive statute, but on the APA, which applies universally.

Respondents seek to obscure the breadth of their position by mischaracterizing the government's. The government does not argue (Opp. 14) that a State lacks standing whenever it could "avoid the harm through a change of policy or behavior." Rather, the government argues that when a State makes a voluntary choice to tie a state-law subsidy to another sovereign's actions, the State does not thereby obtain standing to sue the other sovereign whenever its actions have the incidental effect of increasing the cost of that subsidy.

This Court rejected that self-generated approach to standing in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), which controls here. The only reason the Guidance could cause Texas to incur costs in subsidizing driver's licenses is because of Texas's own choices—and the Guidance does not restrict Texas's ability to change those choices. Neither the Guidance nor any federal law requires Texas to subsidize driver's licenses, issue licenses on the basis of "authorize[d]" presence, Tex. Transp. Code Ann. § 521.142(a) (West Supp. 2015), or define that term in any particular way.[1] Indeed, Texas has defined "authorize[d]" presence in a list of categories of aliens who can obtain driver's licenses that has no equivalent in federal

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[1] If a State participates in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, it is permitted, but not required, to issue licenses to aliens with deferred action. See § 202(c)(2)(B)(viii), 119 Stat. 313.

law. See Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* 2-7 (July 2013). Texas admits (Opp. 14) it could eliminate any connection between the Guidance and its fisc by increasing the price of driver's licenses.[2] And *Pennsylvania* is not confined to situations where a State amends its law "in reaction" to a change to "manufacture standing," Opp. 15, as Pennsylvania enacted its subsidy before the relevant change. See 426 U.S. at 662-663.

Reviewability. a. Respondents do not even contend that the "zone of interests" of any provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, encompasses Texas's asserted interest in not having to choose between paying for its own driver's-license subsidy or changing its own policies. And they do not defend (Opp. 26-27) the court of appeals' zone-of-interests rationale, which rested almost entirely on 8 U.S.C. 1621. See Pet. 19; Pet. App. 36a-38a. Subsidies for driver's licenses are not even "State or local public benefit[s]" under 8 U.S.C. 1621(c).

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[2] Texas would have additional options, including issuing licenses without regard to alienage, see States of Wash. et al. Amicus Br. 9-10, or increasing the price specifically for "temporary visitor" licenses, Tex. Transp. Code Ann. § 521.421(a-3) (West Supp. 2015). Texas could also decline to issue licenses on the basis of deferred action, so long as it did so in a permissible manner and with a sufficient justification. See Gov't C.A. Amicus Br. at 2, 14-16, *Arizona Dream Act Coal.* v. *Brewer*, No. 15-15307 (9th Cir. Aug. 28, 2015) (*ADAC*). *ADAC* did not involve any question of subsidies or costs. Pet. App. 168a. And unlike Arizona in *ADAC*, Texas has not changed its law—or even contended that it would if the Guidance is upheld. That posture renders respondents' claim of injury and causation all the more speculative and attenuated.

Respondents instead assert (Opp. 26-27) that the INA protects a State's interest in "protecting [its] citizens by reserving jobs for those lawfully entitled to work." But Article III bars such a *parens patriae* suit, see p. 3, *supra*, and a plaintiff cannot mix-and-match one interest for Article III purposes and a different interest for zone-of-interests. "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found.* v. *Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996); see 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.7, at 513 (3d ed. 2008) ("[T]he same interest must satisfy both tests.").

Respondents also contend (Opp. 27) that they are "within the zone of interests of the APA's notice-and-comment provision" because they wish to comment on the Guidance. That circular argument would eliminate the zone-of-interests test in all notice-and-comment cases, and is without merit. A party seeking to compel notice-and-comment rulemaking must not only have Article III standing, but must also be "aggrieved" under the "relevant statute." 5 U.S.C. 702. That means the underlying *substantive* statute: here, an operative provision of the INA. *E.g.*, *Mendoza* v. *Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014).

b. Respondents appear not to dispute that the Secretary of Homeland Security has unreviewable discretion to forbear, for a specified period, from removing the people the Guidance covers. See 5 U.S.C. 701(a)(2). Respondents nonetheless contend that the Guidance is reviewable because it "purports to *alter* [INA] requirements," Opp. 20, and "deem[s] unlawful

conduct as lawful," Opp. 2. That fundamentally mischaracterizes the Guidance.

If a person commits a crime, such as entering the United States illegally, 8 U.S.C. 1325, that conduct remains unlawful—and subject to prosecution—with or without the Guidance. Similarly, people with deferred action remain subject to the INA's civil consequence—removal—with or without the Guidance. The Department of Homeland Security (DHS) can revoke deferred action at any time, without notice or process, and it provides no defense to removal. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484-485 (1999) (*AADC*).

The Guidance correctly describes deferred action as "mean[ing] that, for a specified period of time, an individual is permitted to be lawfully present in the United States." Pet. App. 413a. This passage simply describes the effect of *all* deferred action, including on an *ad hoc* basis. See *ibid.* Insofar as deferred action itself is concerned, "lawful presence" is the label for the effect of deciding to forbear from removing the alien for the specified period. Several consequences of deferred action are in turn keyed to statutory terms like "lawful presence." See Pet. 5-7. But that is not unique to the Guidance, which does not change the consequences of deferred action, and does not make the Guidance reviewable.

Those consequences are longstanding and have independent statutory authorization. See Pet. 21-23. Indeed, when this Court decided *AADC*, deferred action already enabled aliens to be "authorized to be * * * employed" and already made aliens "lawfully present" for purposes of participating in Social Security. 8 U.S.C. 1324a(h)(3) (1994); 8 U.S.C. 1611(b)(2)

(Supp. V 1999); see 8 C.F.R. 103.12(a)(3)(i), 274a.12(c)(14) (1999). Respondents' argument that these established consequences under other provisions of law make the Guidance itself reviewable thus proves too much, as it would make *any* grant of deferred action reviewable. This Court would not have held in *AADC* that deferred-action decisions were shielded from judicial interference—and described such interference as "a particular evil"—if those decisions were always reviewable. 525 U.S. at 486 n.9.

Substantive validity. Respondents and the court of appeals wrongly view the Secretary's authority to defer action and grant work authorization as limited to the categories of aliens specified in the INA. That rationale extends far beyond the Guidance and would prohibit most deferred action—including when accorded on an *ad hoc* basis—as well as work authorization given to many categories of aliens for decades. Currently, more than a dozen categories of aliens obtain work authorization purely as a matter of regulation. *E.g.*, 8 C.F.R. 274a.12(a)(11), (c)(1)-(7), (9)-(12), (16)-(17), and (21).

The history of deferred action forecloses that narrow reading of the Secretary's authority. The INA did not even mention deferred action when this Court described it as a "regular practice" and "commendable exercise in administrative discretion, developed without express statutory authorization." *AADC*, 525 U.S. at 484 (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)). No statute mentioned "deferred action" until 2000, when Congress made two categories of aliens eligible for it. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Tit. V,

§ 1503(d)(2)(D)(i)(II) and (IV), 114 Stat. 1522. Such specific statutes do not displace the Secretary's "broad discretion" under 6 U.S.C. 202(5), 8 U.S.C. 1103(a), and 1324a(h). *Arizona*, 132 S. Ct. at 2495. Rather, they confirm that the INA already vested the Secretary with authority to defer action for categories of aliens, and encourage its use more often.

Respondents contend (Opp. 36-37) that, unlike "[m]ost" prior policies for exercising enforcement discretion, DAPA does not respond to an external crisis and is not a bridge to a lawful status. But respondents do not explain why those should be legal prerequisites. Many uses of deferred action—including under the existing DACA policy that respondents do not challenge—are "for humanitarian reasons." *AADC*, 525 U.S. at 484; see Pet. 7-8; see also *Arizona*, 132 S. Ct. at 2499.

In any event, DAPA is a bridge in this same sense. Every alien who could obtain deferred action via DAPA has an existing statutory path towards lawful permanent residence. Parents of U.S. citizen children qualify as "immediate relatives" when the child turns 21. 8 U.S.C. 1151(b)(2)(A)(i). Immediate relative parents who entered lawfully but overstayed may adjust to lawful permanent resident status. See 8 U.S.C. 1255(a) and (c)(2). Immediate relative parents who entered without inspection may, among other avenues, reenter as lawful permanent residents after departing and remaining abroad (unless a waiver is available) for three or ten years. See 8 U.S.C. 1154(a)(1)(A)(i), 1182(a)(9)(B)(i), (ii), and (v). And parents of lawful permanent residents may pursue the same paths when their child becomes a citizen, ordi-

narily after five years of permanent residence. 8 U.S.C. 1427(a).

The history of work authorization similarly forecloses respondents' view. For more than 60 years, the Secretary and his predecessors have relied on their broad authority to administer the immigration laws, 8 U.S.C. 1103(a), to authorize work for aliens who are not specifically designated by statute as work-eligible. *E.g.*, 17 Fed. Reg. 11,489 (Dec. 19, 1952) (8 C.F.R. 214.2(c)). In 1981, the Immigration and Naturalization Service (INS) codified its existing practices and included several nonstatutory categories—including deferred action. 46 Fed. Reg. 25,081 (May 5, 1981).

In 1986, an administrative challenge was brought to those regulations as *ultra vires*, and the INS opened the matter for comment. 51 Fed. Reg. 39,385-39,386 (Oct. 28, 1986). During the comment period, Congress enacted 8 U.S.C. 1324a, making it unlawful for an employer to knowingly hire an "unauthorized alien," and defining that term to exclude any alien who is "authorized to be so employed by [the INA] *or* by the Attorney General." 8 U.S.C. 1324a(a) and (h)(3) (emphasis added). In response, a commenter argued that the Attorney General lacked authority "to grant work authorization except to those aliens who have already been granted specific authorization by the [INA]." 52 Fed. Reg. 46,093 (Dec. 4, 1987). The INS disagreed. "[T]he only logical way to interpret" the phrase "authorized to be so employed by [the INA] or by the Attorney General," the INS explained, "is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fash-

ion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute." *Ibid.* The INS accordingly left its regulations in force. *Ibid.*

Respondents cannot challenge that rulemaking, as the limitations period expired decades ago. See 28 U.S.C. 2401(a). That longstanding interpretation also warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[3]

Notice and comment. Respondents do not dispute that the Guidance is a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (quoting Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). The Guidance thus meets this Court's definition of a "general statement[] of policy" and is exempt from notice-and-comment requirements. *Ibid.*; 5 U.S.C. 553(b)(A).

Respondents instead propose a different test. They contend (Opp. 28) that the Guidance does not qualify because it would be "one of the largest changes in immigration policy in our Nation's history." But the APA's exceptions are "categorical" and do not depend on whether a policy is a change at all. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). Respondents also contend (Opp. 30) that a statement

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[3] Respondents briefly attempt (Opp. i, 37) to inject a constitutional question into this case. Neither court below addressed that argument, which has no independent content and merely recapitulates respondents' unavailing statutory argument.

of policy "must be *tentative*," but the case they cite addresses ripeness. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003). And the Guidance is tentative in the relevant sense: The Guidance informs the public how DHS proposes to exercise its discretion to defer action on a case-by-case basis for a deserving category, but it remains unknown who the deserving individuals will be. Each individual must request consideration, pass a background check, and satisfy the criteria, which require DHS officers to decide, *inter alia*, that there are no other "factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Pet. App. 417a.

Finally, respondents contend (Opp. 30 n.16) that agency heads cannot use general statements of policy to "instruct their subordinates." That is clearly wrong and would hamstring the Executive. The head of an agency cannot realistically implement *any* policy without instructing subordinates. See Pet. 29-30.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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